Supreme Court, U.S.
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No. 86-1419

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES; RICHARD C. LADD,

*Petitioners,*

v.

COOS BAY CARE CENTER, INC., an Oregon Corporation; HANNAH SCHWANKE, Guardian Ad Litem for David and Steven Gibbs; and SANDI WATSON-STOWELL, Guardian Ad Litem for Tami Watson,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENT'S MOTION TO DISMISS

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## QUESTIONS PRESENTED

1. Must the writ of certiorari be dismissed for mootness and lack of jurisdiction because, due to the sale of Coos Bay Care Center to an unrelated third party, respondent Coos Bay no longer operates a nursing home or participates in the Oregon Medicaid Program and the only claims still at issue seek retrospective money damages barred by the Eleventh Amendment?

2. Should this Court dismiss the writ of certiorari when, in addition to the jurisdictional defects resulting from the sale of the Coos Bay Care Center, the issues presented for the Court's review were not addressed by the lower courts and the record is inadequate to allow review of the issues presented?

## RULE 28.1 LIST

Respondent Coos Bay Care Center, Inc. has no parent company, subsidiaries or corporate affiliates to list pursuant to Rule 28.1.

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## RESPONDENT'S MOTION TO DISMISS ON GROUNDS OF MOOTNESS [1]

### OPINIONS BELOW

Respondent Coos Bay Care Center, Inc. ("Coos Bay") adopts the statement of Opinions Below contained in the Brief on the Merits for Petitioners (Pet. Brief at 1).

### JURISDICTION

Respondent Coos Bay adopts the statement of jurisdiction contained in the Brief on the Merits for Petitioners (Pet. Brief at 1) except to note that a judgment was not entered by the Ninth Circuit Court of Appeals. Rather, the Court of Appeals merely reversed the District Court's order dismissing the Complaint with prejudice and remanded the case to the District Court for consideration of the merits of the case. (*See* Pet. Cert. Brief, App. A.)

### CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent Coos Bay adopts the Petitioners' Statement of Statutes and Regulations (Pet. Brief at 1-4) involved for the purposes of this Motion, with the following additions:

1. Article III, Section 2, Clause 1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or

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[1] This Motion is filed on behalf of respondent Coos Bay Care Center, Inc. As used in this motion, the term "respondents" refers both to Coos Bay Care Center and the individual respondents. Although counsel has entered his appearance only on behalf of Coos Bay Care Center, counsel has been authorized to represent respondent Hannah Schwanke. Appropriate documents to substitute Coos Bay's counsel for Ms. Schwanke's present counsel are awaiting execution by Mr. Lojek.

> which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

2. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

3. 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

## STATEMENT OF THE CASE

At the time this suit was filed, respondent Coos Bay Care Center, Inc. operated a nursing home which provided nursing care and related services to aged and developmentally disabled patients. (Pet. Cert. Brief at App-10.) Coos Bay leased the land, buildings, fixtures and most of the equipment utilized in its nursing home from Shoreline Properties, an Oregon partnership. (Joint Affidavit of James C. Griggs and Robert J. Saalfeld included as Appendix A to this Motion at 2a, ¶ 2.) At the time the Complaint was filed, Coos Bay was certified as a provider of services eligible to receive payment for nursing care and services rendered to patients who were beneficiaries of the program established pursuant to the federal Medicaid Act. 42 U.S.C. § 1396 *et seq.*[2] (*See* Pet. Cert. Brief at App-10.)

Respondents filed this suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief as well as damages. Respondents alleged that the Oregon Medicaid Program calculated and reimbursed Coos Bay Care Center for the cost of care rendered to certain nursing home patients in a manner which violated the federal Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A). (Pet. Cert. Brief at App-37.) The prospective component of the relief sought an order compelling the State to calculate and to pay the nursing home in the manner and at the level required by the federal Medicaid Act. (Pet. Cert. Brief at App-38.) In addition, respondents sought damages for the nursing home in an amount "which represents the lack of appropriate reimbursement from May 26, 1982 to the date of the judgment" and an additional sum for each of the individual respondents. (*Id.*)[3]

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[2] Respondents include the nursing home and two individuals. The individual respondents are the guardians *ad litem* for three of the patients who resided in the nursing home at the time suit was filed. Hannah Schwanke is listed in the Complaint and on the Brief in Opposition to Certiorari as the guardian *ad litem* for David and Steven Schwanke. However, the correct names of Ms. Schwanke's sons are David and Steven Gibbs. In addition, the correct name of the second individual respondent is Sandi Watson-Stowell. The correct name of Ms. Watson-Stowell's ward is Tami Watson, not Tami Mauer as listed in the Complaint. Finally, counsel has been advised by the present operator of the nursing home that Tami Watson has not been a patient at the respondent nursing home for approximately three years.

[3] The case was filed as a class action, but does not appear to have been certified as such by the District Court.

Defendants are the Oregon Department of Human Resources ("DHR"), the "single state agency" designated pursuant to 42 U.S.C. § 1396a(a)(5) to administer the Oregon Medicaid Program (*Id.* at App-32), and Richard C. Ladd, the administrator of the division of DHR directly responsible for the Oregon Medicaid Program. (*Id.*)

Respondent Coos Bay no longer operates a nursing home and is no longer eligible to participate in the Oregon Medicaid Program. On June 30, 1987 Southmark Corporation purchased a group of twenty-seven nursing homes, including the nursing home formerly operated by Coos Bay.[4] (*See* Joint Affidavit of James C. Griggs and Robert J. Saalfeld at 2a, ¶ 3 (hereafter "Joint Affidavit")). Southmark purchased only designated assets of the nursing home's former owners, Shoreline Properties and Coos Bay, not including accounts receivable or claims against government reimbursement programs. (*Id.*) [5]

Southmark assigned the assets which it purchased to Coos Bay Associates Limited Partnership, an entity controlled by Southmark. Neither Southmark nor Coos Bay Associates Limited Partnership are related in any way to Coos Bay Care Center, Shoreline Properties, or any of the partners or shareholders in such entities. (Joint Affidavit at 2a, ¶ 3.)

Coos Bay's Medicaid provider agreement with the State of Oregon—which established the nursing home's right to payment from the Oregon Medicaid Program—automatically terminated on June 30, 1987, the date on which ownership of the nursing home was transferred.[6] (Affidavit of Robert M.

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[4] The Agreement of Sale and Purchase encompassed twenty-eight nursing homes, one of which was rejected by the Southmark Corporation at the closing, pursuant to the terms of that Agreement.

[5] Petitioners were notified of the intent to sell and the actual sale on several occasions. Notice was provided by letters dated March 27, 1987, April 15, 1987 and June 23, 1987. (Decker Affidavit at 11a, ¶¶ 4-5.) In addition, applications were made in the name of the new owner to relicense and to recertify the nursing home to participate in the Medicaid Program on April 17, 1987. (*Id.* at ¶ 6.)

[6] Although Coos Bay, technically speaking, continued to participate in the Medicaid Program until June 30, 1987, the date of the sale to Southmark, practical control and possession of the nursing home was transferred to

*(footnote continues)*

Decker, included as Appendix B to this Motion at 12a, ¶ 7.) Shoreline Properties and Coos Bay continue to exist and to own assets, including accrued accounts receivable attributable to care and services rendered prior to July 1, 1987. (Joint Affidavit at 2a-3a, ¶ 3.) Southmark Corporation, the new owner of the nursing home, has not joined Coos Bay in this litigation against the State of Oregon for proper Medicaid reimbursement. Coos Bay's only outstanding claims against the Oregon Medicaid Program are for accrued liabilities—payment for services rendered on or before June 30, 1987—the date on which the nursing home was sold to Southmark.[7] The details of the negotiation and sale are set forth in the Joint Affidavit at 1a-9a.

## SUMMARY OF THE ARGUMENT

Respondent Coos Bay Care Center, Inc. ("Coos Bay") hereby moves this Court to dismiss the writ of certiorari granted in this case and to remand this case to the United States Court of Appeals for the Ninth Circuit with directions to dismiss for lack of jurisdiction. Events occurring after this Court granted the petition for writ of certiorari—namely, the sale of substan-

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*(footnote continued)*

Southmark by a Management Agreement on April 1, 1987. The Management Agreement provided that Southmark was "solely and exclusively entitled to receive all revenue and pay all expenses" of the nursing homes covered by the Agreement, including Coos Bay, effective April 1, 1987. (Joint Affidavit at 4a, ¶ 9.)

[7] The April 1, 1987 Agreement of Sale and Purchase, which governed the sale of the nursing home operations to Southmark Corporation, provides that patient charges (*i.e.*, rents) and other sums payable by or on behalf of the patients are not to be prorated at the sale's closing. (Joint Affidavit at 7a, ¶ 14.) The Agreement also provides that all payments received from governmental reimbursement programs shall first be applied to reduce the accrued liabilities due the seller (respondent Coos Bay) for each patient covered by the payment. Only the balance, if any, is to be paid to Southmark, the purchaser. The Agreement specifically permits the seller to pursue legal relief for delinquent claims for accrued liabilities. (*See id.*) The parties to the sale and purchase discussed the claim against the Oregon Medicaid Program and agreed that the claim was not among the assets purchased by Southmark. (*See* Affidavit of Don R. Bybee, included as Appendix C to this Motion at 15a, ¶ 3.)

tially all of the assets of the respondent nursing home—render moot respondents' claims for prospective declaratory and injunctive relief. The Eleventh Amendment bars respondents' remaining claims for retrospective relief. There is no doubt that there is no remaining case or controversy which can be adjudicated in a federal court. Therefore, the case must be dismissed.

## ARGUMENT

### I. THIS CASE MUST BE DISMISSED BECAUSE THE FEDERAL COURTS DO NOT HAVE JURISDICTION TO HEAR RESPONDENTS' CLAIMS, OR TO AWARD RELIEF.

Jurisdiction over respondents' case is barred for two reasons. First, the sale of the nursing home rendered respondents' claims for prospective relief moot.[8] Second, the Eleventh Amendment precludes federal jurisdiction over the only claims remaining in this action, those for increased Medicaid payment for services rendered prior to the date the nursing home was sold. The writ of certiorari ought to be dismissed.

Article III of the Constitution requires, as a prerequisite to the exercise of federal jurisdiction, that there exist "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [relief]." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312

[8] The Complaint predicates the claims of the individual respondents on their status as third party beneficiaries of the now-terminated provider contract. In addition the relief sought by the individual respondents, damages and injunctive relief, was predicated on the same theory advanced by Coos Bay—that the Medicaid Program underpaid the nursing home for their care. In order to prevail therefore, the individual respondents would have to make the same showing as Coos Bay with regard to inadequate reimbursement. However, Coos Bay no longer provides services to the individual respondents. The new owner of the nursing home has not joined this litigation. There are no allegations that the new owner is under-reimbursed or that the individual respondents are not receiving all appropriate and necessary care from the new owner. The costs incurred by the new owner to serve its patients are likely to be very different than those incurred by Coos Bay, but the record does not address the question. Thus, the individual respondents have alleged no ongoing present violation distinct from the allegations made by Coos Bay. For these reasons, this Motion draws no distinction among the respondents.

U.S. 270, 273 (1941). At all stages of federal court litigation the plaintiffs must be under threat of further injury as a result of defendant's conduct, *cf. Edgar v. MITE Corp.*, 457 U.S. 624 (1982), and have a "personal stake in the outcome" which assures the concrete adverseness necessary for resolution of the issues. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, a case may become moot and the jurisdiction of the federal courts extinguished, even after certiorari has been granted, if the factual circumstances change so that plaintiff no longer suffers injury which can be remedied by federal court intervention, *see, e.g., Board of License Comm'rs of the Town of Tiverton v. Pastore*, 469 U.S. 238 (1985), or because the statute or regulation at issue in the litigation is amended or modified and the defendant comes into compliance with the law. *See, e.g., Green v. Mansour*, 474 U.S. 64 (1985).

Even where an actual controversy is present, the jurisdiction conferred on the federal courts by Article III of the Constitution is restricted by the Eleventh Amendment.[9] *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). This Court repeatedly has reaffirmed the longstanding rule that the Eleventh Amendment bars federal jurisdiction over a suit against a state by private parties seeking to impose liability which must be paid from public funds in the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 653 (1974).

In *Ex parte Young*, 209 U.S. 123, 128 (1908), however, this Court held that the federal courts retained jurisdiction, notwithstanding the Eleventh Amendment, to order state officials to conform their future conduct to the requirements of

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[9] The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State.

Although the language of the Amendment expressly includes only suits against a state by citizens of another state, this Court has held that the Eleventh Amendment bars suits against a State by its own citizens as well. *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Papasan v. Allain*, ____ U.S. ____, 106 S. Ct. 2932, 2939 (1986).

federal law, even though injunctive relief might have an ancillary effect on the State treasury. *See also Quern v. Jordan,* 440 U.S. 332, 337 (1979); *Edelman,* 415 U.S. at 667-68. As this Court explained in *Quern v. Jordan,* " [t]he distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." *Quern,* 440 U.S. at 337 (footnote omitted).

This Court has noted that the difference between permissible relief and that which is barred by the Eleventh Amendment "will not in many instances be that between day and night." *Edelman,* 415 U.S. at 667. There are, however, certain types of relief which the decisions of this Court demonstrate clearly are prohibited by the Eleventh Amendment.[10]

Thus, the Eleventh Amendment bars a federal court from awarding "damages," *Kentucky v. Graham,* 473 U.S. 159, 170 (1985), "retroactive" payments, *Pennhurst,* 465 U.S. at 103; *Quern,* 440 U.S. at 333, 338; *Milliken v. Bradley,* 433 U.S. 267, 290 (1977), or "compensation." Indeed, the decisions of this Court establish that the Eleventh Amendment prohibits any retrospective relief against a state which is "measured in terms of a monetary loss resulting from a past breach of a legal duty" by the state or its agents. *Edelman,* 415 U.S. at 668; *Papasan v. Allain,* ____ U.S. ____, 106 S. Ct. 2932, 2940 (1986); *Green,* 106 S. Ct. at 426; *Quern,* 440 U.S. at 337. Federal jurisdiction over a claim against a state is proscribed by the Eleventh Amendment decisions of this Court unless the state is engaged in an "ongoing" "present," or "continuing" violation of the plaintiffs' rights, as opposed to a violation which occurred in the past. *Papasan,* ____ U.S. ___, 106 S. Ct. at 2942; *Green v. Mansour,* 474 U.S. 64, 106 S. Ct. at 426. Further, this Court has long emphasized that the Eleventh Amendment bars federal jurisdiction "to the extent [that] the suit [seeks] 'the award of an *accrued* monetary liability . . .' which represent[s] retroactive payments." *Milliken,* 433 U.S. at 289 and n. 22

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[10] The parties are seemingly in agreement that the Eleventh Amendment bars respondents' claims for retroactive monetary relief. (*See* Pet. Brief at 41 ("Clearly, however, the claim for retroactive monetary damages is barred by the Eleventh Amendment.")).

(*quoting Edelman v. Jordan,* 415 U.S. 651, 664 (1974) (emphasis in original)); *see also Papasan v. Allain,* ___ U.S. ___, 106 S. Ct. 2932, 2942 (1986).

### A. The Sale Of The Nursing Home Mooted Respondents' Claims For Prospective Relief.

The sale to Southmark of the nursing home formerly operated by Coos Bay rendered moot respondents' claims for prospective declaratory and injunctive relief. The provider contract between Coos Bay and the Oregon Medicaid Program which authorized Coos Bay to provide covered services to Medicaid beneficiaries and established the nursing home's right to Medicaid reimbursement was terminated by the sale. (*See* Affidavit of Robert M. Decker at 12a, ¶ 7.) Application has been made to have the nursing home relicensed and for a new provider agreement in the name of the new operator. (*Id.*)

Coos Bay is not licensed as a nursing home, no longer has the capacity to deliver nursing care, is not party to a Medicaid provider contract, and cannot seek or be paid Medicaid reimbursement by the Oregon Medicaid Program. The Complaint, however, seeks to compel the State to increase Medicaid payments to Coos Bay to a level sufficient to satisfy the dictates of the Medicaid Act. Because Coos Bay does not have an ongoing relationship with the Oregon Medicaid Program, respondents no longer suffer ongoing injury from the State's conduct and have no claim which can be remedied by prospective relief.

In other, similar situations this Court has dismissed a writ of certiorari after being informed by counsel that the subject of the controversy had sold its business. *Board of License Comm'rs of the Town of Tiverton v. Pastore,* 469 U.S. 238 (1985) (*per curiam*). In *Tiverton,* a case involving whether the exclusionary rule applies in civil liquor license revocation hearings, this Court held that the case became moot because of the sale of the tavern whose license had been revoked. This Court stated that the case was moot because "no decision on the merits by this Court can now have an effect on the [tavern's] liquor license." *Id.,* 469 U.S. at 239. This Court implicitly found that the sale of the business had the "effect of depriving

the Court of jurisdiction due to the absence of a continuing case or controversy. . . ." *Id.*, 469 U.S. at 240. Respondents' effort to compel defendants to conform to the Medicaid Act in the future plainly likewise has been rendered moot by the sale of the nursing home. *See, e.g., Green v. Mansour,* 474 U.S. 64, 106 S. Ct. 423, 424-25 (1985); *Friendship Villa-Clinton v. Buck,* 512 F. Supp. 720 (D. Md. 1981); *cf. Tiverton,* 469 U.S. 238.

**B. The Eleventh Amendment Bars Respondents' Remaining Claims For Relief.**

The only remaining actual controversy between the parties is whether the Oregon Medicaid Program paid Coos Bay at a rate sufficient to satisfy the federal Medicaid Act for services delivered on and before June 30, 1987, the date of the sale to Southmark. Respondent suffers no ongoing or current injury attributable to the State's illegal conduct. The sole effect of any relief awarded in this case would be to determine that the Oregon Medicaid program had under-reimbursed Coos Bay for nursing care and services rendered prior to the date of the sale to Southmark.

In similar circumstances, this Court repeatedly has held that the Eleventh Amendment deprives federal courts of jurisdiction over claims against a state when the only effect of an order would be to determine the existence or amount of an accrued liability. *See, e.g., Papasan v. Allain,* ____ U.S. ____, 106 S. Ct. 2932, 2942 (1986); *Green v. Mansour,* 474 U.S. 64, 106 S. Ct. 423, 428 (1985). The writ of certiorari ought to be dismissed because any relief awarded to respondents at this stage plainly would be compensatory, retrospective monetary damages measured in terms of the monetary loss which resulted from the State's past breach of the duties imposed by the Medicaid Act—precisely the type of relief proscribed by the Eleventh Amendment.[11]

In fact, on at least four occasions, this Court and the lower federal courts have held that the Eleventh Amendment deprives federal courts of jurisdiction over claims arising under the Social Security Act where, as here, events subsequent to the

[11] The Complaint expressly measures the amount of damages by the amount of under-reimbursement. *See* Pet. Cert. Brief at App-38.

filing of the complaint transform a litigant's claim from one for prospective relief into one which seeks only retrospective money damages. In all four cases, the courts have held that the Eleventh Amendment barred jurisdiction because, as a result of changed circumstances, the plaintiff lost its claim for prospective relief under the challenged provisions of the state-administered program.

In *Green v. Mansour,* 474 U.S. 64, 106 S. Ct. 423 (1985), plaintiffs challenged the state's calculation of benefits paid pursuant to Title IV of the Social Security Act, commonly known as Aid to Families with Dependent Children ("AFDC"). Congress amended the statute before a final decision was rendered on the merits of the claim. There was no dispute that the state was calculating benefit payments as required by the amended statute. Plaintiffs conceded that their claim for *Young* type injunctive relief was rendered moot by the amendments to the AFDC program. Because there was, as here, no present violation of law which continued to injure plaintiffs, this Court held that any relief would be tantamount to an award of damages prohibited by the Eleventh Amendment.

In *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association,* 450 U.S. 147 (1981) (*per curiam*), this Court held that the Eleventh Amendment deprived the federal courts of jurisdiction to determine whether certain nursing home reimbursement provisions of the Florida Medicaid Program violated the then-current federal Medicaid Act. After commencement of the litigation, Congress amended the reimbursement provisions of the federal Medicaid Act and adopted a new reimbursement standard. Similarly, Florida abandoned its flat rate payment system and adopted a new payment methodology. Because the plaintiffs' attack on the defunct flat rate payment system was the only cause of action articulated by the nursing home plaintiffs, the only relief available from the federal court, as here, was a determination that the state's past reimbursement practices violated the Medicaid Act. This Court held that Florida had not waived its Eleventh Amendment immunity by participating in the federal Medicaid Program and ordered that the case be dismissed. *Id.,* 450 U.S. at 150.

In *Shashoua v. Quern*, 612 F.2d 282 (7th Cir. 1980) (*per curiam*), the Seventh Circuit reached a similar conclusion. A physician who, at the time suit was filed, had been eligible to be reimbursed for services provided to Medicaid beneficiaries challenged reimbursement provisions of the Illinois Medicaid Program. After the suit was instituted, the physician ceased to have a medical practice which served Medicaid recipients. In addition, the reimbursement schedules, about which the physician originally complained, had been replaced by new regulations. The Court of Appeals held that the claim for prospective relief became moot when the physician stopped providing services covered by the Medicaid Program. As here, there was no present controversy or continuing injury for which prospective relief could be awarded. The case was dismissed because the Eleventh Amendment precluded jurisdiction over the physician's remaining retrospective reimbursement claim against the state.

*Friendship Villa—Clinton, Inc. v. Buck*, 512 F. Supp. 720 (D. Md. 1981), is practically identical to the present case. Plaintiff Clinton was a licensed nursing home which, like Coos Bay, participated in the Medicaid Program pursuant to a provider contract with the state. In July, 1980, Clinton filed suit seeking declaratory and injunctive relief enjoining the state from calculating Clinton's reimbursable costs in violation of the Medicaid statute and applicable federal regulations. On September 19, 1980, Clinton's parent corporation, Friendship Villa Equity Corporation, sold all of its interests in sixteen nursing homes, including Clinton. Because it no longer operated a nursing home or participated in the Medicaid Program, Clinton, like respondent Coos Bay, lost its claim for prospective relief, retaining only a cause of action for liabilities which had accrued prior to sale of the nursing home, when services were rendered to Medicaid beneficiaries.

The district court held that Clinton's claim for prospective relief became moot when the nursing home ceased to provide services for which payment was available from the Maryland Medicaid Program. The court also held that jurisdiction over claims for increased reimbursement for services provided prior

to the sale was precluded by the Eleventh Amendment. According to the court: "[T]he Eleventh Amendment forbids federal court determination of liability on the part of a state for past benefits owed by a state even when the state provides a method by which claims for such payments may be raised in future state proceedings." *Friendship Villa,* 512 F. Supp. at 725 (D. Md. 1981) (*citing Jordan v. Trainor,* 563 F.2d 873 (7th Cir. 1977), *aff'd sub nom. Quern v. Jordan,* 440 U.S. 332 (1979)).

*Green, Florida Nursing Home Association, Shashoua, Friendship Villa* and *Tiverton* dictate that this case should be dismissed for lack of jurisdiction. When Coos Bay ceased to operate a nursing home and to participate in the Oregon Medicaid Program, the nursing home's claim for prospective relief became moot. The only effect of any relief which the District Court might award would be to require the Oregon Medicaid Program to provide additional reimbursement for services rendered prior to the sale of the nursing home. Because the respondent patients and their guardians also seek an order increasing Medicaid payments to Coos Bay and because such claims are wholly derivative of Coos Bay's rights under its now-terminated provider contract, the patients' claims also are entirely retrospective.

If this case is not dismissed, respondents will be in the awkward position of prosecuting a claim over which the District Court has no jurisdiction and for which they can obtain no relief in the federal courts. Because the Eleventh Amendment bars federal jurisdiction, respondents' remedy for inadequate Medicaid reimbursement for services rendered prior to the sale of the nursing home lies in a state forum. Further review by this Court is not constitutionally permissible and the case should be dismissed forthwith.

## II. THIS COURT SHOULD DISMISS THIS CASE BECAUSE THE ISSUES PRESENTED FOR SUPREME COURT REVIEW WERE NOT ADDRESSED BY THE COURTS BELOW AND BECAUSE THE RECORD IS INADEQUATE FOR SUPREME COURT REVIEW.

Although federal court jurisdiction over this case is barred because of mootness and by the Eleventh Amendment, Supreme Court review in this instance is also inadvisable in light

of the limited record before the Court. It is clear that (1) the issues which certiorari was granted to review were not decided by the lower courts, and (2) the record is not sufficiently developed to permit decision on either issue presented by the petition for writ of certiorari. This Court has stated that a writ of certiorari will be dismissed when plenary consideration "shed[s] more light on [a] case than in the nature of things was afforded at the time the petition for certiorari was considered. . ." *Belcher v. Stengel,* 429 U.S. 118, 119-120 (1976) (*per curiam* ).

**A. Neither The Ninth Circuit Nor The District Court Decided The Issue of Whether Exhaustion Of Administrative Remedies Was Required Prior To Federal Judicial Review Or Whether There Were Any State Administrative Remedies That Could Have Been Exhausted.**

The first issue presented by the petition for writ of certiorari is:

> May health care providers and their patients bypass state remedies and sue under 42 U.S.C. § 1983 to challenge state Medicaid reimbursement decisions when, pursuant to express directives of the Medicaid Act and federal implementing regulations, the state has established administrative procedures specifically to address those claims?

(Pet. Cert. Brief at i.) There are two problems with Supreme Court review of this issue.

Neither the Court of Appeals nor the District Court determined whether there are any state administrative procedures that could have been exhausted. Determination of whether the state has administrative procedures which could have considered respondents' claims and afforded relief is an obvious prerequisite to the question of whether or not respondents must exhaust administrative remedies before they can bring suit under Section 1983. Plainly, respondents could not be directed to pursue state administrative remedies prior to federal judicial review if no such remedies exist.

The Ninth Circuit held that the availability of state administrative remedies was irrelevant. (Pet. Cert. Brief at App-4, n.2.) Since the Court declined "to review the state administrative procedures and contractual remedies assertedly available to plaintiffs under Oregon law", (*id.*), it never determined whether there were in fact any state remedies available which plaintiff might or should have exhausted.[12] Similarly, the District Court expressly refused to determine whether exhaustion of administrative remedies was a precondition to federal judicial review. (*See id.* at App-13.)

In *Smith v. Butler,* 366 U.S. 161 (1961) (*per curiam*), this Court determined that certiorari was improvidently granted when "it became manifest that the course of litigation and the decisions in the [lower] courts did not turn on the issue on the basis of which certiorari was granted." *See also California v. Taylor,* 353 U.S. 553 (1957); *Lawn v. United States,* 355 U.S. 339 (1958); *but see, e.g., Capital Cites Cable, Inc. v. Crisp,* 467 U.S. 691, 697-698 (1984) (*per curiam*) (citations omitted). So it is in this case. Neither the Ninth Circuit's nor the District Court's decisions turned on the issue of whether state remedies were available and those courts therefore never addressed the question whether exhaustion of administrative remedies was a prerequisite to federal court review. Because the lower courts did not determine whether there are, in fact, any state administrative procedures through which plaintiffs might have obtained relief, respondent submits that the Court should not decide this issue.

Further, the uncontradicted evidence in the record is that state Medicaid officials had made clear, prior to filing of this action, that no administrative review was available and that any attempt to pursue the present claims administratively would be futile. As respondents' affidavit of Robert Decker, states:

> Your affiant has been told by these Oregon State officials that it would be futile to pursue any type of

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[12] Not only did the Ninth Circuit not determine if Oregon had in fact established administrative procedures, but it also intimated that the remedies established by the state in response to the federal Medicaid regulations (requiring states to establish administrative review procedures) might not be comprehensive enough. (Pet. Cert. Brief at App-3.)

> administrative procedure or administrative remedy and that, in fact, no administrative procedures were available to your affiant or to his patients which could address this type of problem. Your affiant has further been told that no request for additional funding will be made by the State of Oregon for heavy care patients. . .

(Affidavit of Robert Decker, J.A. at 18.) [13]

In contrast, petitioners claimed that the State of Oregon established administrative procedures and judicial review by statute and administrative rule, and that providers and residents may challenge agency decisions regarding Medicaid reimbursement or benefits. (*See* State of Oregon's Ninth Circuit Brief at 24.) Respondents answered—with support in Mr. Decker's affidavit—that no administrative review was available and that any attempt to exhaust administrative remedies would be futile. The availability and effectiveness of state administrative remedies was disputed as a matter of fact and law, but the conflict never was resolved by the courts below.

At best, the record before the Court demonstrates that there were no available or effective state administrative procedures through which respondents might have obtained relief. In such case there is no basis for Supreme Court review, for respondents cannot be remanded to non-existent or futile administrative procedures. *See United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-430 (1966). At worst, the record is unclear as to the availability and effectiveness of state administrative remedies. The failure of the courts below to determine whether state administrative remedies existed and should have been exhausted before federal judicial review obscures the question presented for review by this Court and requires this Court to resolve, in the first instance, issues of state law more appropriately left to the lower courts in the first instance.

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[13] Nowhere in any of the proceedings below did Petitioners by way of affidavit, argument or otherwise, even attempt to refute Mr. Decker's statement.

In *Kimbrough v. United States,* 364 U.S. 661 (1961) (*per curiam* ), this Court dismissed a writ of certiorari after concluding, upon a more thorough review of the record than was possible when the petition for certiorari was granted, that the statutory questions were "not presented with sufficient clarity. . ." *See also Massachusetts v. Painten,* 389 U.S. 560, 561 (1968) (This Court dismissed a writ of certiorari as improvidently granted when it found that the record was not "sufficiently clear and specific to permit decision of the important constitutional questions involved" in the case).

Before this Court holds that the respondents should have exhausted state administrative remedies it must be determined that such remedies exist and that the effort to present the claims would not have been futile as alleged by respondents. The need for this Court to dispositively determine mixed questions of state law and of fact in the first instance on a limited record suggests strongly, in conjunction with the mootness and Eleventh Amendment problems already discussed, that this case should be dismissed.[14]

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[14] Even if the exhaustion question were properly presented, Supreme Court review of this issue would be unwarranted. This Court already has considered whether exhaustion of administrative remedies is a predicate to federal judicial review of claims against state agencies participating in joint federal-state programs created by the Social Security Act. In *King v. Smith,* 392 U.S. 309 (1968), for example, this Court, despite a statutory requirement that states create a fair hearing process, held that claimants to Aid to Families for Dependent Children benefits under Title IV of the Social Security Act did not have to exhaust state administrative remedies prior to seeking federal judicial review. *Id.,* 392 U.S. at 312 n.4. Similarly, in *Rosado v. Wyman,* 397 U.S. 397, 406 (1970) this Court held that exhaustion of federal administrative remedies was not a prerequisite to federal judicial review of claims that a state was violating the Social Security Act. *See also Wright v. Roanoke Redevelopment Housing Authority,* _____U.S._____, 107 S. Ct. 766, 773 (1987).

*King* and *Rosado* have been cornerstones of Social Security Act jurisprudence for almost twenty years. If the Court wishes to reconsider *King* and *Rosado,* it should do so based on a fully developed record which presents the issues in a concrete fashion. The District Court and the Courts of Appeals are in the best position to resolve the mixed questions of fact and state law presented by the record here. Moreover, this Court ought to have the benefit of the views of the lower courts on the issue before conducting its own review.

**B. Neither The Ninth Circuit Nor The District Court Ruled That A Violation Of The State Medicaid Plan Constituted A Violation Of Federal Law, *i.e.*, The Medicaid Act, Actionable Under Section 1983, Nor Is There A Conflict In The Lower Courts On This Question.**

The second issue presented by the petition for writ of certiorari is:

> Do the rate reimbursement provisions established by the states as a part of their state Medicaid Plans give rise to federal rights enforceable under 42 U.S.C. §1983?

(Pet. Cert. Brief at i.) Review of this issue is unwarranted for several reasons in addition to the jurisdictional defects noted previously.

The Court of Appeals and the District Court did not decide whether violation of a State Medicaid Plan was the equivalent of violation of the Medicaid Act and therefore actionable under Section 1983. In fact, the Court of Appeals, in its opinion, never even alludes to the existence of the State Medicaid Plan. The court held that plaintiffs had alleged a direct violation of the reimbursement provisions of the federal Medicaid Act. The court specifically stated:

> To prevail on the merits, plaintiffs must convince the trial court that the actions and non-action of the State of Oregon violate the standard set out in 42 U.S.C. § 1396a(a)(13)(A).

(*See* Pet. Cert. Brief at App-5.) The Court of Appeals held that such an alleged violation of the Social Security Act stated a cause of action under this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980).

Once again, the rule of *Smith v. Butler*, 366 U.S. 161 (1961) (per curiam), that the Court should not review questions not decided below, suggests that the writ of certiorari should be dismissed as improvidently granted. The alleged

violation of the State Medicaid Plan played absolutely no role whatsoever in the decisions of the courts below.

Even if the Court of Appeals had decided that violation of a State Medicaid Plan, *ipso facto,* constitutes a violation of federal law, *i.e.,* the Medicaid Act, actionable under Section 1983, Supreme Court review is unwarranted. Courts have consistently held that violation of similar state plans constitutes a violation of federal law subject to federal judicial review. *See Barnes v. Cohen,* 749 F.2d 1009 (3d Cir. 1984), *cert. denied,* 471 U.S. 1061 (1985); *Rose v. Heintz,* 806 F 2d 389 (2d Cir. 1986); *Geis v. Board of Education,* 774 F.2d 575 (3d Cir. 1985); *Everett v. Schramm,* 772 F.2d 1114 (3d Cir. 1985); *David D. v. Dartmouth School Committee,* 775 F.2d 411 (1st Cir. 1985), *cert. denied, sub nom. Massachusetts Dep't of Education v. David D.,* ____ U.S. ____, 106 S. Ct. 1790 (1986); *Miami University Associated Student Government v. Schriver,* 735 F.2d 201 (6th Cir. 1984); *Hillhaven Corp. v. Wisconsin Dep't of Health and Social Services,* 634 F. Supp. 1313 (E.D. Wis. 1986) (vacated pursuant to a stipulated settlement order). The consistency in the decisions of the Courts of Appeals strongly suggests that Supreme Court review of this issue is not necessary. *See Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387 (1923).

## CONCLUSION

In this case, there is no longer an ongoing "case or controversy" between the parties. Therefore, with respect to respondents' claims for prospective relief, the case has become moot. Respondents' only remaining claims against the Oregon Medicaid Program are for increased reimbursement for accrued liabilities incurred for services rendered prior to sale of the nursing home on June 30, 1987. Respondent Coos Bay submits that the writ of certiorari would not have been granted if this case had been in its present posture when the writ was sought.

The inappropriateness of Supreme Court review in this case is further exacerbated by the fact that the lower courts did not decide the issues raised in the petition for certiorari and by the absence of a fully developed record. Respondent Coos Bay therefore respectfully requests that this Court dismiss the writ of certiorari and remand the case to the United States Court of Appeals for the Ninth Circuit with directions to dismiss for lack of jurisdiction. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

Respectfully submitted,

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*Coos Bay Care Center, Inc.*

* *Counsel of Record*

**Appendix A**

**(EXHIBITS TO AFFIDAVITS OMITTED IN PRINTING)**
**(SIGNATURES AND HANDWRITTEN MATERIAL OMITTED IN PRINTING)**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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**No. 86-1419**

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STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES; RICHARD C. LADD,

*Petitioners,*

v.

COOS BAY CARE CENTER, an Oregon corporation; Guardian Ad Litem; HANNAH SCHWANKE, Guardian Ad Litem for David and Steven Schwanke; and SANDY MAUER, Guardian Ad Litem for Tami Mauer,

*Respondents.*

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## JOINT AFFIDAVIT OF JAMES C. GRIGGS AND ROBERT J. SAALFELD

James C. Griggs and Robert J. Saalfeld being duly sworn according to law jointly depose and state as follows:

1. James C. Griggs is an attorney licensed to practice law in the State of Oregon since December 23, 1975. Robert J. Saalfeld is an attorney licensed to practice law in the State of Oregon since November 7, 1974. Mr. Saalfeld is a member of the bar of this Court and has appeared on the brief in opposition to the petition for writ of certiorari in this case. Messrs. Griggs and Saalfeld are members of

the law firm of Harland, Ritter, Saalfeld, Griggs & Gorsuch, P.C., 693 Chemeketa Street N.E., Salem, Oregon 97301.

2. Messrs. Griggs and Saalfeld have represented respondent Coos Bay Center Center, Inc. ("CBBC, Inc.") for four (4) years and its president, Don R. Bybee for seven (7) years. Prior to July 1, 1987, CBCC, Inc. operated the nursing home which seeks additional Medicaid reimbursement in the present action. However, prior to July 1, 1987 the land, building, fixtures and most of the equipment utilized by CBCC, Inc. to provide nursing home services were owned by Shoreline Properties, an Oregon partnership, and leased to CBCC, Inc.. Mr. Bybee owns a fifty percent interest in Shoreline Properties. Messrs. Griggs and Saalfeld have represented Shoreline Properties for three (3) years. The nature of legal services performed on behalf of CBCC, Inc., Shoreline Properties and Mr. Bybee by Messrs. Griggs and Saalfeld have been to advise CBCC, Inc., its president and Shoreline with respect to tax, real estate, corporate and related matters.

3. Messrs. Griggs and Saalfeld jointly negotiated and closed the sale of a group of twenty-eight nursing homes, including the nursing home operated by CBCC, Inc. to Southmark Corporation and its assignees. Southmark Corporation was not and is not related to CBCC, Inc., Shoreline Properties, Mr. Bybee or to any other person or entity which formerly held an ownership or operating interest in CBCC, Inc. or in Shoreline Properties. The sale of the assets of Shoreline Properties and CBCC, Inc. principally the land, buildings, fixtures, equipment and operations of the nursing home formerly operated by CBCC, Inc. closed on June 30, 1987. Southmark purchased only the designated assets of Shoreline Properties and CBCC, Inc., not including accounts receivable or claims against governmental reimbursement programs. Shoreline Properties and CBCC, Inc. continue to exist and own assets, including accrued accounts receivable attribut-

able to care and services rendered prior to July 1, 1987. Effective upon the date of the change of ownership, however, CBCC, Inc. ceased to provide services to beneficiaries of the Medicaid Program, and its only outstanding claims against the Oregon Medicaid Program are for payment for services rendered on or before June 30, 1987, the date of closing. The background of the sale and purchase transaction is set forth below.

4. Prior to July 1, 1987, CBCC, Inc. was a party to a "provider agreement" with the State of Oregon. Pursuant to the provider agreement, the State of Oregon agreed to pay CBCC, Inc. for nursing care and related services rendered to beneficiaries of the joint federal-state program established pursuant to the Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* Payment to CBCC, Inc. was to be made at the rates determined using the payment methodologies set forth in the Medicaid Act and in the Oregon State Medicaid Plan. In the dispute presently before this Court, CBCC, Inc. and several of its patients allege that the Oregon State Medicaid Plan and the payment methodologies set forth in such plan were adopted in violation of the Medicaid Act and its implementing regulations.

5. In November, 1986, Southmark entered into negotiations with Mr. Bybee to lease a group of nursing homes, including CBCC, Inc. In February, 1987, Southmark submitted to Mr. Bybee a formal, written proposal to lease certain designated nursing homes, including CBCC, Inc. After further discussions, however, Mr. Bybee agreed to consider selling the nursing homes to Southmark if acceptable terms could be agreed upon.

6. On February 18, 1987, the parties entered into a formal letter of intent to sell and to purchase a group of forty-one specified nursing homes, including the nursing home which was then operated by CBCC, Inc. The letter of intent was binding on both parties, subject to certain rights reserved to Southmark, such as the right to inspect the nursing home operated by CBCC, Inc. and certain

other designated nursing homes in the group. The letter of intent established a closing date of April 3, 1987 for the sale of all of the nursing homes.

7. In mid-March, 1987, the transaction stalled due to certain difficulties encountered in connection with the purchase of thirteen of the nursing homes included in the original group of forty-one identified in the February 18, 1987 letter of intent. After further negotiations, the parties agreed to continue with the sale and purchase, but to delete from the transaction the thirteen nursing homes which had become problematic.

8. Because of the difficulties encountered in resolving the issues created by the thirteen problematic nursing homes and as a result of further negotiations between the parties, it was not possible to close the sale and purchase of the remaining twenty-eight nursing homes on April 3, 1987 as agreed in the letter of intent. The parties therefore agreed to enter a Management Agreement and executed an Agreement of Sale and Purchase on April 1, 1987. The Management Agreement and the Agreement of Sale and Purchase covered each of the remaining twenty-eight nursing homes, including the nursing home operated by CBCC, Inc. The parties established a new, tentative closing date of June 1, 1987.

9. The effect of the Management Agreement was to transfer possession and operational control of the nursing homes, including CBCC, Inc., to the buyer, Southmark Corporation, effective April 1, 1987. For example, the Management Agreement provides that "during the term of this Agreement, the Manager [i.e., Southmark] . . . shall be solely and exclusively entitled to receive all revenue and pay all expenses and shall be fully responsible for the management of the Facility and all operations thereof." *See* Exhibit No. A, ¶ 2. Southmark managed the nursing homes, including the nursing home operated by CBCC, Inc. through its subsidiary National Heritage Management, Inc. ("NHI").

10. The Agreement of Purchase and Sale also was dated April 1, 1987. The Agreement provided for the sale and purchase of twenty-eight nursing homes, including the nursing home operated by CBCC, Ind. The Agreement specifically afforded the buyer, i.e., Southmark, "the remedy of specific performance of the obligations of Seller under this Agreement." *See* Exhibit B, § VIII, ¶ B at 28. The Agreement also recognized that "Coos Bay Care Center . . . is the subject of a dispute between Bybee and Gabrielson who are entering into this Agreement, and certain other partners of that Seller who are not parties to this Agreement." *See* Exhibit B, § V, ¶ G at 25. The dispute referred to in the Agreement related to the refusal of all partners in Shoreline Properties, the owner of the land, building and equipment utilized by CBCC, Inc. in its nursing home operations, to consent to the sale. Consent of all partners was a prerequisite to the sale. The Agreement obligated Mr. Bybee to "bring an action or proceeding. . . to require the Seller of Coos Bay to convey Coos Bay to Purchaser." *Id.* The obligation was imposed on Mr. Bybee to pursue legal action to require conveyance of the nursing home and related assets because the parties were not certain all of the Shoreline Properties partners would provide the required consent for the sale.

11. Sale and purchase of the nursing home operated by CBCC, Inc. required conveyance by both Shoreline Properties, the owner of the land, building fixtures and equipment and by CBCC, Inc., the lessee-operator of the nursing home. Southmark had made clear throughout the negotiations that it would purchase only the assets of the nursing homes and only if they could be obtained in fee simple. Southmark had no interest in purchasing and would refuse to purchase the operations of any nursing home without the land, buildings, equipment and related assets. Refusal of any of the Shoreline partners to consent to the sale would have stopped the sale of the land, buildings, fixtures and equipment utilized by CBCC, Inc. to operate the nursing home. If the assets owned by Shore-

line Properties could not be conveyed, the sale and purchase of the nursing home operated by CBCC, Inc. would not have been consummated.

12. At this time the parties contemplated closing the sale, assuming that all preconditions were satisfied, on May 30, 1987. However, in late April, 1987, the parties determined that the transaction was subject to pre-notification requirements imposed by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The seller made the required filing with the Federal Trade Commission on May 11, 1987 and Southmark filed on May 14, 1987. The application was supplemented on at least two occasions after filing and not completed until approximately May 23, 1987. The Federal Trade Commission notified the seller on June 17, 1987 that it would take no action to stop the sale and purchase. It had not yet been possible to obtain the consent to the sale of all Shoreline Properties partners.

13. All required consents to the Agreement of Sale and Purchase necessary for the sale of all twenty-eight nursing homes, except for the sale of the nursing home operated by CBCC, Inc., were obtained between April 1, 1987 and April 3, 1987. *See* Exhibit No. B, at 39-51. The required consents for the sale of the nursing home operated by CBCC, Inc. were obtained only after negotiations between the Shoreline partners and a cash advance to one partner to set off against his proportionate distribution under the Agreement of Sale and Purchase. The last consent required for the sale of the nursing home operated by CBCC, Inc. was obtained on June 24, 1987, and the Agreement of Sale and Purchase was executed thereafter by all of the Shoreline partners.

14. During the negotiations which culminated in the Agreement of Sale and Purchase dated April 1, 1987, the parties discussed the claim of CBCC, Inc. for increased Medicaid payments which is the substantive dispute in the litigation currently before the Court. The parties agreed that the Medicaid reimbursement claim against the State of Oregon would remain the property of CBCC, Inc., and the

claim was not one of the assets sold by CBCC, Inc. or purchased by Southmark. The Agreement of Sale and Purchase excluded all accounts receivable from the assets sold to and purchased by Southmark. In pertinent part, the Agreement provides:

> Uncollected rents and other sums payable under the Leases which have accrued prior to the Adjustment Date [i.e., April 1, 1987] shall not be prorated at the Closing. . . . All rents and patient charges received by Purchaser from governmental agencies under governmental reimbursement programs shall be applied first to any outstanding amounts due therefrom to Seller with respect to each patient covered by such payment and thereafter to such amounts as are due to Purchaser. Nothing in this Paragraph A(iv) shall restrict Seller's right to collect delinquent patient charges or rents directly from a tenant by any legal means or shall obligate Purchaser to attempt to collect such delinquent patient charge or rents on Seller's behalf.

*See* Exhibit B, § IX, ¶ A(iv) at 29. The Agreement of Sale and Purchase defines "leases" to mean the admission agreements specifying the payment rate and payor (e.g., Medicaid, Medicare, private) for each patient. *See* Exhibit B, § III, ¶ L at 7.

15. The sale and purchase of the nursing home operated by CBCC, Inc. closed on June 30, 1987. Attached on Exhibit C is the Warranty Deed executed by Shoreline properties conveying the real property utilized by CBCC, Inc. to Southmark's assignee, Coos Bay Associates Limited Partnership. Attached as exhibit D is the Bill of Sale and Assignment of all personal property associated with the nursing home's operations.

16. Ownership of CBCC, Inc. was not sold or transferred to Southmark. CBCC, Inc. continues to be owned

by the same shareholders who owned the corporation prior to the transaction with Southmark. Don R. Bybee continues to serve as president of CBCC, Inc. The sole effect of the transaction with Southmark was to transfer the nursing home assets and operations from CBCC, Inc. to Southmark. The principle assets owned by CBCC, Inc. and Shoreline Properties are the right to the sale proceeds arising under the Agreement of Sale and Purchase and the right to collect certain receivables resulting from services rendered prior to April 1, 1987. CBCC, Inc. no longer has the capacity to provide nursing or related services to beneficiaries of the Oregon Medicaid Program. CBCC, Inc.'s only outstanding claims against the Oregon Medicaid Program are for accrued liabilities attributable to underreimbursement for care and services rendered prior to July 1, 1987, the date ownership of the nursing home was transferred to Southmark. Effective April 1, 1987, CBCC, Inc. had assigned its right to all revenues to Southmark or its assignee under the Management Agreement.

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JAMES C. GRIGGS
HARLAND, RITTER, SAALFELD,
GRIGGS & GORSUCH,
a Professional corporation
693 Chemeketa Street N.E.
Salem, OR 97308

STATE OF OREGON
COUNTY OF MARION } ss.

The foregoing instrument was acknowledged and sworn before me this day of July, 1987, by James C. Griggs.

Before me:

Notary Public for Oregon
My Commission Expires: _____

ROBERT J. SAALFELD
HARLAND, RITTER, SAALFELD,
GRIGGS & GORSUCH,
a Professional corporation
693 Chemeketa Street N.E.
Salem, OR 97308

STATE OF OREGON
COUNTY OF MARION } ss.

The foregoing instrument was acknowledged and sworn before me this day of July, 1987, by Robert J. Saalfeld.

Before me:

Notary Public for Oregon
My Commission Expires: _____

**Appendix B**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**No. 86-1419**

STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES; RICHARD C. LADD,

*Petitioners,*

v.

COOS BAY CARE CENTER, an Oregon corporation; Guardian Ad Litem; HANNAH SCHWANKE, Guardian At Litem for David and Steven Schwanke; and SANDY MAUER, Guardian Ad Litem for Tami Mauer,

*Respondents.*

## AFFIDAVIT OF ROBERT M. DECKER

Robert M. Decker being duly sworn to law deposes and states as follows:

1. I, Robert M. Decker, currently hold the position of Vice President-Salem Division with National Heritage, Inc. ("NHI"). National Heritage, Inc., a wholly owned subsidiary of Southmark Corporation, manages the nursing home previously operated by Coos Bay Care Center, Inc. ("CBCC, Inc.") on behalf of Southmark and its assignee, the Coos Bay Associates Limited Partnership.

2. Prior to April 1, 1987 I held the position of Executive Vice President of Chartham Management. Don R. Bybee served as president of Chartham Management.

Chartham was in the business of operating and managing nursing homes. Chartham provided management services to CBCC, Inc.

3. I was involved in the negotiations related to the sale and purchase of twenty-eight nursing homes, including the nursing home formerly operated by CBCC, Inc., by Southmark pursuant to the Agreement of Sale and Purchase described in the Joint Affidavit of James C. Griggs and Robert J. Saalfeld. One part of my duties and responsibilities at Chartham and, after April 1, 1987, at NHI was to file appropriate notices with the State of Oregon reflecting the change of ownership of the nursing home formerly operated by CBCC, Inc. Such notice was necessary to obtain relicensure in the name of the new owner, to terminate the Medicaid "provider agreement" held by CBCC, Inc. and to secure a new "provider agreement" in the name of the new operator authorizing the nursing home to receive payment from the Oregon Medicaid Program for care and treatment provided to beneficiaries of such Program.

4. Attached as Exhibit A is a letter dated March 27, 1987 from me (as Executive Vice President of Chartham Management) to the Health Division, State of Oregon. The letter formally notifies the state that a letter of intent has been signed to sell the nursing home formerly operated by CBCC, Inc. and requests an application for relicensure.

5. Attached as Exhibits B and C are two letters dated April 15, 1987 and June 23, 1987 from me (as Vice President-Salem Division of NHI) to the Health Division, State of Oregon providing notifications of the purchase by Southmark, the purchase price and the anticipated closing date.

6. Attached as Exhibit D is the application dated April 17, 1987 to relicense the nursing home formerly operated by CBCC, Inc. in the name of the new operator. The application indicates that relicensure is necessary due to the change in ownership which was then expected to occur on June 1, 1987.

7. Attached as Exhibit E is "Long-Term Care Facility Request for Certification in the Medicare and/or Medicaid Program" dated April 9, 1987. The request for certification to participate in the Oregon Medicaid Program was submitted to obtain Medicaid certification in the name of the new operator because the change of ownership which occurred as a result of the sale by Shoreline properties and CBCC, Inc. to Southmark automatically terminated the nursing home's existing Medicaid provider agreement and its right to payment for care and services rendered to beneficiaries of the Oregon Medicaid Program.

8. Attached as Exhibit F is the "Disclosure of Ownership and Control Interest Statement" filed on behalf of Southmark and its assignee, Coos Bay Associates Limited Partnership along with the request for Medicaid certification. The Disclosure statement is a prerequisite to Medicaid certification. The form and its attachments indicates that the nursing home changed ownership effective July 1, 1987, that the nursing home is now owned by Coos Bay Associates Limited Partnership and that the nursing home is managed by NHI. As the disclosure statement indicates, no person or entity which held any ownership or operational interest in CBCC, Inc. or in the nursing home CBCC, Inc. formerly operated owns any part of the nursing home's new operator or owner.

9. Relicensure and recertification of nursing homes in Oregon following a change in ownership is relatively routine and is usually handled as an administrative matter. The new license and provider agreement for the nursing home formerly operated by CBCC, Inc. has not yet been received. Final application for the license was not possible until June 23, 1987, however. I anticipate receiving the new license and provider agreements effective July 1, 1987 in the immediate future. New licenses and provider agreements have been received already for all other nursing homes purchased by Southmark pursuant to the Agreement of Sale and Purchase dated April 1, 1987. Of course

the applications for relicensure and or new provider agreements were able to be filed much earlier than for the nursing home formerly operated by CBCC, Inc. because the other sales were certain to occur.

Further affiant sayeth not.

Robert M. Decker

STATE OF UTAH
COUNTY OF SALT LAKE } ss.

The foregoing instrument was acknowledged and sworn to before me this day of July 1987.

Before me:

Notary Public for Utah
My Commission Expires: _____

**Appendix C**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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**86-1419**

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STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES; RICHARD C. LADD,

*Petitioners,*

vs:

COOS BAY CARE CENTER, an Oregon corporation, Guardian Ad Litem; HANNAH SCHWANKE, Guardian Ad Litem for David and Steven Schwanke; and SANDY MAUER, Guardian Ad Litem for Tami Mauer,

*Respondents.*

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## AFFIDAVIT OF DON R. BYBEE

Don R. Bybee being duly sworn according to law deposes and says as follows:

1. I am the president of Coos Bay Care Center, Inc. ("CBCC, Inc."), the respondent in this action. I have been a principal stockholder in CBCC, Inc. since its formation. I have served as president of CBCC, Inc. since the corporation was formed. In addition, I am a fifty percent partner in Shoreline Properties, an Oregon partnership. Prior to July 1, 1987, Shoreline Properties owned the land, buildings, fixtures and most of the equipment (the "assets") utilized by CBCC, Inc. to provide nursing home care and service. Prior to July 1, 1987 the assets were leased by Shoreline to CBCC, Inc. The assets of Shoreline properties

were purchased by Southmark Corporation on July 1, 1987 and assigned to Coos Bay Associates Limited Partnership.

2. The Agreement of Sale and Purchase dated April 1, 1987 covering the sale of the assets of Shoreline Properties and the nursing home operations of CBCC, Inc. is attached as Exhibit B to the Joint Affidavit of James C. Griggs and Robert J. Saalfeld filed in this action. Section XI, paragraph A(iv) (page 29) provides that patient charges (i.e., rents) and other sums payable by or on behalf of patients shall not be prorated at the closing. The Agreement also provides that payments received from governmental reimbursement programs shall be applied first to reduce accrued liabilities due the Seller for each patient covered by the payment, with the balance being paid to the purchaser. Further, the Agreement specifically permits the Seller to pursue legal relief for delinquent claims for accrued liabilities.

3. It was and is my understanding that the purpose of Section IX, paragraph A(iv) was to reserve accounts receivable due from or on behalf of patients, including claims against state Medicaid programs, to the Seller, in this instance CBCC, Inc. It is my understanding and it was my intention that the reimbursement claim at issue in this litigation would remain an asset of CBCC, Inc. In fact, during the negotitions, the status of the reimbursement claim at issue in this litigation was discussed with representatives of Southmark, and it was agreed that the claim would remain the property of CBCC, Inc. and not be transferred to Southmark or its assignee.

4. Because the Shoreline assets formerly used (pursuant to lease) by CBCC, Inc. to provide nursing care and services reimbursable by the Oregon Medicaid Program were sold to Southmark and changed ownership effective July 1, 1987, CBCC, Inc. no longer provides any services for which payment is available from the Oregon Medicaid Program. CBCC, Inc.'s only remaining reimbursement claim against the Oregon Medicaid Prog-

ram is for accrued liability attributable to under-reimbursement paid for care and services provided prior to July 1, 1987.

Further affidavit sayeth not.

_____

Don R. Bybee

STATE OF OREGON
COUNTY OF MARION } ss.

The foregoing instrument was acknowledged and sworn before me this day of July, 1987, by Don R. Bybee.

Before me.

_____

Notary Public for Oregon
My Commission Expires: _____

No. 86-1419

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

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STATE OF OREGON
DEPARTMENT OF HUMAN RESOURCES;
RICHARD C. LADD,

Petitioners,

v.

COOS BAY CARE CENTER, INC., an Oregon Corporation;
HANNAH SCHWANKE, Guardian Ad Litem for
David and Steven Gibbs; and SANDI
WATSON-STOWELL, Guardian Ad Litem for Tami Watson

Respondents.

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AFFIDAVIT OF SERVICE OF RESPONDENT'S MOTION TO DISMISS

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Janice L. Hoffman, being duly sworn, deposes and says:

I am a member in good standing of the Bar of the District of Columbia Court of Appeals. On this 24th day of August, 1987, I instructed Ms. Beverly A. Patton, my secretary, to serve via United States mail, first class, postage prepaid, three true and correct copies of Respondent's Motion to Dismiss on each of the following counsel of record for the parties and amicus:

Virginia L. Linder
Solicitor General
State of Oregon
400 Justice Building
Salem, Oregon 97310

Donald W. Lojek
LOJEK & HALL, CTD.
305 West Fort Street
Boise, Idaho 83702

Charles Fried
Solicitor General
DEPARTMENT OF JUSTICE
10th and Constitution Avenue
Washington, D.C. 20530

Benna Ruth Solomon
Chief Counsel
State and Local Legal Center
444 North Capital Street, N.W.
Suite 349
Washington, D.C. 20001

Corinne K.A. Watanabe
First Deputy Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Ms. Patton subsequently reported to me that she had deposited the envelopes containing the service copies of Respondent's Motion to Dismiss in a mailbox in front of the United States Post Office located at 1111 - 20th Street, N.W., Washington, D. C. 20036 at 12:00 p.m. on that day.

I further attest that all parties required to be served have been served.

Respectfully submitted,

Janice L. Hoffman

Janice L. Hoffman
CASSON, CALLIGARO & MUTRYN
1233 20th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 778-1100

Counsel for Respondent
Coos Bay Care Center

District of Columbia )

Subscribed to and sworn before me this 21st day of August, 1987.

Beverly A. Patton
Notary Public

My Commission Expires: 4/30/91